* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: March 13, 2007.
Date of Decision : April 24, 2007.

\+ W.P.(C) 2291/2005 & CM. No. 1678/2005

M/S J.K. STEELOMELT (P) LTD. ..... Petitioner
Through Mr. V.P. Chaudhary, Senior Advocate with
Mr. G. Tushar Rao, Advocate.

versus

BSES RAJDHANI POWER LTD. ..... Respondent
Through Ms. Veronica Mohan, Advocate.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

JUDGMENT

:Dr. S.Muralidhar, J.

1. A speaking order dated 24.12.2004 passed by the Respondent BSES Rajdhani Power Ltd. holding the petitioner guilty of dishonest abstraction of energy (DAE) has been challenged in this petition.

Background Facts

2. The Petitioner has a sanctioned load of 58.43 KW (cooling load of 48 KW) in the industrial (light/power/mix) category. It is stated that on 2.3.2002 a joint inspection team of the Meter Tampering Department of the erstwhile Delhi Vidyut Board (`DVB') conducted a surprise check during which it was found that in regard to the CT box and meter box seals, the upper seal wire was found broken and the lower side seal was found missing. In the inspection report it was observed that “disc found moving in right direction on each phase”. The paper seal was affixed on the CT meter box to maintain status quo. The inspection report prepared was signed by the representative

of the Petitioner.

3. The erstwhile Delhi Electric Supply Undertaking (DESU) also issued an inspection record dated 2.3.2002 after jointly inspecting the premises with the Enforcement Officer of the DVB. In this inspection record, it was observed that the connected load was 35.034 as against the sanctioned load of 78.33 HP. One DG set of 30 KVA was found installed.

4. The Petitioner was asked to attend a personal hearing on 8.3.2002, which it says it did. It is claimed that thereafter an Officer of the Respondent visited the premises of the Petitioner to fix a permanent seal but demanded illegal gratification which he refused.

5. On 5.10.2002, the Petitioner applied for reduction in the sanctioned load from 78 HP to 20 HP since its production had come down. The Petitioner has placed on record a copy of the said application.

6. It is stated that on 23.2.2003 another inspection was carried out by the team of the BSES Rajdhani Power Limited ('BRPL'), the successor entity. This record of inspection stated that as far as the existing seals were concerned, one was found whereas the other was not visible and was found in a faded and worn condition. As regards the CT box and Meter box seals, the seals were found detached (in a broken condition) but as regards the meter terminal seals, the remark was "Intact & OK". The report stated that the seals were removed and preserved in an envelope at the site. The meter glass and both rivets were also found intact. It is stated that a paper seal was

pasted.

7. It is claimed that on 13.12.2004 an officer of the Respondent BRPL visited the premises of the Petitioner and demanded illegal gratification on account of there being no permanent seal on the CT Box. The Petitioner claims that on its refusal to accede to this request they were threatened with the filing of a false complaint. Thereafter, a show cause notice was issued and the Petitioner was given a personal hearing on 22.12.2004. Consequent thereto the impugned speaking order dated 24.12.2004 was passed holding that the Petitioner was guilty of DAE. The Petitioner was issued a bill on 11.1.2005 for an amount of Rs. 13,32,789.00 by applying the LDHF. The computed consumption was assessed at 52590 units. The Petitioner's representation dated 13.1.2005 was responded with another notice dated 18.1.2005 requiring it to pay the demanded sum. Thereafter, the Petitioner approached this Court by filing the present writ petition.

8. While directing the notice to issue in the writ petition on 8.2.2005 this Court stayed the disconnection of electricity subject to the Petitioner depositing Rs. 1 lakh.

Pleadings

9. The case of the Petitioner is that the impugned speaking order refers to the Inspection Report dated 13.12.2004 whereas the show cause notice issued prior to that, refers to only the inspection dated 2.3.2002. The Petitioner states that it never received the copy of the so-called Inspection Report dated 13.12.2004. It is submitted that the consumption pattern for the six months prior to the date of the alleged inspection on 13.12.2004 showed that there was no pilferage

or abnormal consumption and that the Petitioner had been regular in paying all the dues.

10. The counter affidavit filed on behalf of the Respondent maintained that an inspection was indeed carried out on 13.12.2004 during which the CT meter box seal was found missing and the meter terminal seals were found missing. A connected load of 63.515 KW was found as against the sanctioned load of 58.43 KW. It was claimed that the petitioner's representative was present at the site during the time of said inspection. The paper seal affixed on 29.2.2003 was not found on the meter. The recorded consumption was only 36.79% of the computed consumption and, therefore, it was a case of DAE.

11. Since no documents were annexed to the reply, this Court required the Respondent to place on record the documents available with it. Pursuant to this direction, on 22.11.2006 the Respondent filed an additional affidavit placing on record copies of the inspection reports dated 2.3.2002, 23.2.2003 and 13.12.2004, has also placed on record photographs taken at the time of inspection on 13.12.2004.

12. Both parties have also filed their respective written submissions.

Submissions of Counsel

13. The submissions made by Mr. V.P. Chaudhary, the learned senior counsel, appearing on behalf of the Petitioner is that in terms of the definition of DAE in Regulation 2 (m) of the Delhi Electricity Reforms Commission (Performance and Standards of Meter) Regulations, 2002 (`DERC Regulations') unless the Respondent was able to establish that the Petitioner had tampered with the internal mechanism of the meter, there could be no inference of DAE. He

submits that merely because the meter seals or the glass was found tampered or broken, there could not be an automatic inference of DAE. There had to be 'conclusive evidence' in terms of Regulation 25 (iii) to prove DAE. The inspection reports dated 2.3.2002, 23.2.2003 and 13.12.2004 were not indicative of any tampering by the Petitioner with the internal mechanism. This coupled with the fact that the Petitioner had in 2002 itself applied for reduction of the sanctioned load from 78HP to 20 HP, explained the drop in the consumption pattern during the six months prior to the date of the inspection dated 13.12.2004.

14. Mr. Chaudhary submitted that the copy of the inspection report dated 13.12.2004 was never given to the Petitioner, and it was only brought on record for the first time along with the additional affidavit of the Respondent. This itself was a violation of the principles of natural justice since a document not referred in the show cause notice thereafter relied upon in the speaking order without a copy being furnished to the Petitioner. He also submitted that the provisions of Rule 56 of the Indian Electricity Rules, 1956 had not been complied with while sealing the meter.

15. On behalf of the Respondent Ms. Veronica Mohan, learned counsel submitted that when the Petitioner responded to the show cause notice by its letter dated 22.12.2004, it never made a demand for the copy of the inspection report dated 13.12.2004. It is submitted that the show cause notice contains the following endorsement:

> "Enforcement case No. AG06120400008 dated 13/12/2004"

She states that this endorsement was indicative of the fact that there had been an inspection on 13.12.2004 and the statement that the inspection report was enclosed actually mean the inspection report dated 13.12.2004. It is further stated that even during the hearing the Petitioner attended pursuant to the personal notice, made no demand for inspection report dated 13.12.2004. After the speaking order was passed, when the Petitioner wrote a letter on 13.1.2005, it did not ask for a copy of the inspection report. It is claimed that the photographs taken on 13.12.2004 show the presence of the Petitioner and, therefore, there is no violation of the principles of natural justice. As regards the demand of reduction of the sanctioned load, it is submitted that the Petitioner had not followed up on such an application, and in any event the connected load was found to be higher than the sanctioned load at the time of inspection dated 13.12.2004. It is stated that proceedings have been separately initiated under Section 135 of the Electricity Act, 2003 (`Act') and, therefore, this Court should not interfere with the speaking order passed by the Respondent.

Has a case of DAE been made out?

16. This Court would first like to examine the inspection report dated 13.12.2004 which forms the basis of the speaking order in order to determine if it makes out a case of DAE against the petitioner. The inspection report dated 13.12.2004 states that "the condition of the wiring was OK." As against the column of 4.5.1 stating "material evidence collected", box `no' is checked. The CT box seals and meter box seals were missing but the meter half seals were found intact. The meter working was normal. In the remarks column, it is stated that "disc moving in right direction on all 3

phases on applying external heating load." The meter window glass stated to be OK. The connected load is stated to be 63.51 KV. The inspection report dated 13.12.2004 records that "it is a case of suspected DAE" and that photographs have been taken by digital camera.

17. The said inspection report shows that there was no abnormality found in the meter half seals, in the meter working, and in the movement of the disc. The meter window glass was also found OK. The two abnormalities found were that the CT box and the meter box seals were missing. The condition of wiring was OK and no material evidence was collected.

18. In order to appreciate the two defects above, one has to go back to the inspection reports of 2.4.2002 and 23.2.2003. The report dated 2.3.2002 bears the endorsement "paper seal duly signed by joint team and pasted on MS box." The inspection report also shows that the upper side seal and the lower side seal were found missing. However, the fact that these two seals were missing on 2.3.2002 did not lead to an inference of DAE since obviously the respondent found no abnormality in the consumption pattern or any evidence of tampering with the internal mechanism of the meter.

19. The same position seems to have continued on 23.2.2003. Although one of the paper seals was found in torn condition, the meter terminal seals were found OK. Even at this time, the seals were found detached and in a broken condition. The rivets were intact and so was the meter glass. Significantly the meter terminal seal and the CT meter box seal were preserved in an envelope at the

site. Thus even after this inspection no DAE was inferred.

20. Therefore, the fact that the CT box seals and meter box seals were missing at the inspection on 13.12.2004, appears to be a continuation of the status quo on 23.2.2003, and in the absence of any material evidence (which as indicated in the last report of 13.12.2004 was not collected), an inference of DAE could not have been drawn only on that basis. There is nothing in these reports that goes to suggest that the petitioner tampered with the internal mechanism of the meter.

21. This Court has in a series of decisions in ***Udham Singh v. BSES Rajdhani Power Ltd.*** 136 (2007) DLT 500, ***Col. R.K. Nayyar v. BSES*** (Judgment dated 18.4.2007 in W.P. (C) No.2904 of 2005) and ***Smt. Jagdish Narayan v. NDPL*** (Judgment dated 18.4.2007 in W.P. (C) No. 10287 of 2005 etc.) interpreted the provisions of Section 135 of the Act read with the DERC Regulations. The relevant passages of the last mentioned judgment in ***Jagdish Narayan*** reads as under:

> "23. What is central to the definition of theft under Section 135 of the Act, which according to the respondent covers DAE as well is the element of 'dishonesty'. Therefore the *mens rea* or the intention of the consumer to dishonestly abstract electricity must be proved "conclusively" to bring home the charge of DAE. Therefore the requirement of "conclusive evidence" in terms of Regulation 25 (iii) is consistent with the statutory mandate of Section 135 (1). That can be established only by showing that the consumer was responsible for tampering the meter by some visible means. The external manifestations of tampering, as has been found in the inspections conducted in the present cases, can only raise a suspicion of DAE. That suspicion will have to be made good by some tangible evidence of physical means of tampering before the presumption can be drawn that it was the consumer who tampered the meter.

24. The decision of the Hon'ble Supreme Court in ***Jagannath Singh v. B.S. Ramaswamy*** [1966] 1 SCR 885 is illustrative although there the Court was concerned with a criminal conviction for the offence of theft of electricity under Sections 39 and 44 of the Indian Electricity Act, 1910. The approach to the requirement of proof of dishonest abstraction of energy is nevertheless relevant for the present case. The Hon'ble Supreme Court held that the existence of artificial means for abstracting energy can only give rise to a presumption that there had been a dishonest abstraction. The supplier would still have to show that the consumer is responsible for such tampering. In the said case, it was contended that the existence of an open stud hole on the meter was sufficient proof that dishonest abstraction of energy had taken place. In answer to that contention, the Hon'ble Supreme Court observed as under:

> "A meter with an exposed stud hole, without more, is not a perfected instrument for unauthorized taking of energy, and cannot be regarded as an artificial means of its abstraction. To make it such an artificial means, the tampering must go further, and the meter must be converted into an instrument for recording less than the units actually passing through it. A check meter affords an easy method of proving that the consumer's meter is recording less than the units consumed and is being used as an artificial means for abstraction of the unrecorded energy. To bring home the charge under Section 39, the prosecution must also prove that the consumer is responsible for the tampering. The evidence adduced by the prosecution must establish beyond doubt that the consumer is guilty of dishonest abstraction of energy."

25. Applying the above test, it has to be held that an automatic presumption of DAE on the basis of the external symptoms of tampering together with the analysis of the consumption pattern would not be a safe and error free method. Some other tangible evidence must be shown to exist. An accu check meter can be deployed to find out if the meter is in fact recording lesser units. The analysis of the consumption pattern in terms of the Regulation 26 (ii) is merely

corroborative and not by itself substantive evidence of DAE. The decision of this Court in ***Udham Singh v. BSES Rajdhani Power Ltd***. 136 (2007) DLT 500 is to the same effect. In fact, the formula is applied in terms of Regulation 25 (iv) read with 26 (ii) only for determining the penalty payable by the consumer once a case of either direct theft or DAE has been made out. The penalty formula cannot itself supply the proof of DAE or theft."

22. In reiteration of the above judgments, it is held that in order to establish DAE through conclusive evidence, it is incumbent on the respondent to show, not merely with the reference to the consumption pattern, but by some other tangible evidence that there has been the tampering with or access by the petitioner to the internal mechanism of the meter in a manner that would slow down the consumption. This could be, for instance, in the form of an accuchek instrument being used to detect if the meter was recording lesser consumption than it should.

23. In the present case, the formula for levying penalty in the case of confirmed DAE in terms of Regulation 26(ii) has been used to infer DAE. As already mentioned in the above judgments, that formula can be applied only after DAE is first established through the conclusive evidence. Apart from the fact that the two seals were found missing there is no tangible evidence in the instant case to show that there has been a tampering with the internal mechanism of the meter by the consumer to make the meter recording lesser consumption of electricity. In this case as well no accuchek instrument has been employed to detect if the meter was recording lesser units. On the other hand, both the inspection reports dated 2.3.2002 and 13.12.2004 indicate that the disc was moving in the right direction on

all three phases. The fact that the disc was moving in the right direction, in the absence of any accuchek instrument being used, should have actually led the respondent to conclude that the case of DAE had not been established. In the circumstances, there can be no manner of doubt that the inspection report dated 13.12.2004 cannot lead to an inference of DAE at all. Thus the very basis of the impugned speaking order stands vitiated.

Violation of Natural Justice

24. In view of the above conclusion, the other submissions of the Petitioner about it not being furnished with the copy of the inspection report dated 13.12.2004 along with the show cause notice issued prior to the passing of the speaking order need not be examined. However, it should be observed that the burden of showing the supply of relevant documents to the Petitioner is definitely on the respondent. The endorsement on the inspection report dated 13.12.2004 shows that the consumer had refused to sign. However, this by itself does not settle the issue since this endorsement is by an official of the respondent. The respondent will then have to show that a copy of this report was dispatched to the Petitioner by registered post or any other verifiable means. Without the supply of the documents upon which the Respondent is relying to draw an inference adverse to the Petitioner, there would be justification in the consumer claiming that there has been a violation of the principles of natural justice. In such cases, it will not be a valid defence for the respondent to contend that the Petitioner should have asked for a copy of the report. If the Petitioner in fact did not know that such a report existed then it is hardly surprising that it did ask for such a report. The decision of this court in ***Harvinder Motors v. BSES***

Rajdhani Power Ltd. 135 (2006) DLT 198 also underscores the importance of complying with the principles of natural justice.

25. Nothing has been brought on record in the instant case to show that the Respondent had in fact dispatched the inspection report dated 13.12.2004 to the Petitioner by registered post or otherwise. That burden was on the respondent which it did not discharge. The mere fact that the speaking order contained a reference to an enforcement case dated 13.12.2004 without anything more can hardly be construed to be a reference to the inspection of that date. The photographs too do not show whether in fact the inspection report was prepared and given to the petitioner.

Connected load alone cannot form basis for DAE

26. The Petitioner is also right in contending that the reduction in the consumption pattern in the six months previous to the inspection report dated 13.12.2004 was consistent with its application for reduction of sanctioned load from 78 HP to 20 HP. The explanation offered by the Respondent that the Petitioner had not followed up this application can hardly justify an inference of DAE on the basis of the reduced units. It is one thing to plead that the connected load is more than the sanctioned load but is another to say that in fact the connected load has been used throughout by the Petitioner. This could be only verified by the actual consumption recorded in the meter. If, as is indicated in the inspection report, the meter wiring is OK and the disc is moving in the right direction then the actual units recorded will reflect how much of the connected load is in fact being used. Therefore, merely because the connected load is more than the sanctioned load, cannot lead to an automatic presumption that the

entire connected load is being used by the consumer throughout the period.

Conclusion

27. For all of the above reasons, this Court finds that the impugned speaking order dated 24.12.2004 holding that the Petitioner is guilty of DAE is unsustainable in law and is accordingly set aside. Consequently, the demand raised in the impugned bill dated 11.1.2005 also would stand quashed. The amount paid by the Petitioner pursuant to the interim order dated 8.2.2005 will now become refundable to the Petitioner together with interest at 12 per cent per annum from the date of payment till the date of refund. The refund should be made to the Petitioner within a period of 4 weeks from today and in any event not later than 25.5.2007. In addition costs of Rs.5,000 will be paid by the Respondent to the Petitioner within a period of 4 weeks and in any event not later than 25.5.2007.

28. With the above directions, the writ petition is allowed. The security bond furnished by the Petitioner is cancelled. The application is disposed of.

Sd/-

April 24, 2007 (S. Muralidhar)
ak Judge